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March 13, 2013

VIA OVERNIGHT MAIL

Presiding Justice Roger W. Boren
Associate Justice Judith Ashmann-Gerst
Associate Justice Victoria M. Chavez
California Court of Appeal, 2nd District
Division Two
Ronald Reagan State Building
300 S. Spring Street 2nd Floor, North Tower
Los Angeles, California 90013

Re: **Request for Publication** (Cal. Rules of Court, rule 8.1105(c))
Gonzalez v. Downtown LA Motors, LP. ("Gonzalez")
Second District Court of Appeal Case No. B235292
Los Angeles County Superior Court Case No. BC350769
Opinion Filed March 6, 2013

To Presiding Justice Roger W. Boren and the Associate Justices of the California Court of Appeal, Second Appellate District, Division Two:

The California Employment Lawyers Association ("CELA") respectfully requests the Court publish the *Gonzalez* opinion filed on March 6, 2013. California Rule of Court 8.1120(a). A copy of the unpublished opinion is attached. *Gonzalez v. Downtown LA Motors, LP.* (*Gonzalez*).

CELA is a non-profit organization dedicated to protecting workers' rights in the State of California. CELA's members represent employees in all types of employment cases in state and federal courts and before administrative agencies, including employment discrimination, wrongful discharge, wage and hour, and unemployment insurance matters. In each of these substantive areas of law, CELA's members and their clients work to ensure employers follow California and Federal employment laws.

An opinion “should be certified” for publication in the Official Reports if the opinion meets *any* of the nine reasons for publication in Rule 8.1105, sub-divisions (c) (1)-(9).¹ CELA submits that the *Gonzalez* opinion meets several of these reasons.

Gonzalez is the first California Court of Appeal decision to determine how employers meet minimum wage laws for employees paid by other than an hourly rate, such as a piece-rate or commission. California law requires that employees be paid at least minimum wage for all hours worked, whether paid hourly, by piece rate or commissions. See, IWC Wage Orders, Sec. 4(B). As seen in the reference to several ongoing district court cases noted below, parties in state-wide litigation are currently battling the interpretation of this provision. The question is whether employers must pay additional pay for all hours worked during which employees are required to perform tasks other than compensable piece-rate tasks, or whether the piece rate or commission compensation may be said to include payment for tasks for which employees are not otherwise compensated or to meet minimum wage obligations by averaging such earnings over the course of a work day. An earlier published decision by Division Six relied on by the *Gonzalez* court determined that employees compensated *by the hour* must be paid at least minimum wage for every hour they are required to work, but until the *Gonzalez* decision, no appellate court had determined whether that same standard applied to workers compensated by other methods. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324. *Gonzalez* now affirmatively answers the question by providing that employers must pay at least minimum wage for time under the employer’s control during which piece rate employees are not earning piece wages.

Downtown LA Motors paid its technicians a flag rate for servicing automobiles, but required them to remain at work even when there were no vehicles to service, and to perform non-service tasks, like “obtaining parts, cleaning their work stations, attending meetings, traveling to other locations to pick up and return cars, reviewing service bulletins, and participating in on-line training.” Slip Opinion, *4. Downtown LA Motors contended that, although technicians were not paid directly for time spent on non-piece-rate tasks, when total piece-rate compensation was divided by total hours worked, the average compensation exceeded minimum wage for all hours. *Id.* *9. The *Gonzalez* court

¹ **CRC 8.1105(c) Standards for certification**

An opinion of a Court of Appeal or a superior court appellate division-whether it affirms or reverses a trial court order or judgment-should be certified for publication in the Official Reports if the opinion:

- (1) Establishes a new rule of law;
- (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- (3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
- (6) Involves a legal issue of continuing public interest

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determined this method of compensation was unlawful and that Downtown LA Motors was required to pay technicians for all hours worked. *Id.*, *13.

Employees in *Armenta* were paid by the hour to maintain utility poles. *Armenta*, *supra* at 316. Their time was classified as “productive” or “nonproductive,” depending on whether it was directly related to maintaining the poles in the field, and employees were not paid for “nonproductive” time. *Id.* The employer argued the “average hourly rate in any given pay period was higher than California’s minimum wage and, therefore, it had not violated” the law. *Armenta*, *supra* at 319 (emphasis in original). The *Armenta* court found “averaging all hours worked ‘in any work week’ to compute an employer’s minimum wage obligation under California law is inappropriate. The minimum wage standard applies to each hour worked.” *Armenta*, *supra* at 324.

Armenta’s finding that an employer cannot satisfy its minimum wage obligation by averaging the hourly compensation paid to an employee, has been cited in only two published state court opinions. *Fitz-Gerald v. SkyWest, Inc.* (2007)155 Cal. App. 4th 411, *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal. App. 4th 289. Both interpret only hourly compensation plans.

Gonzalez thus concerns an issue of first impression in the California Court of Appeal: whether or not *Armenta*’s prohibition against averaging hourly wages paid to meet the obligation to pay at least minimum wage for all hours worked applies to the averaging of non-hourly wages, in this case, piece-rate wages. This Court looked to District Court decisions and found support for its analysis and application of the applicable wage order, Labor Code provisions, and the *Armenta* holding, to a piece-rate system. *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246, 1252 (C.D. Cal. 2011).

Although other District Court cases have followed the reasoning of *Armenta*, there are conflicts among the Courts. Most courts find that *Armenta* prohibits averaging to meet minimum wage obligations in piece-rate and commission contexts. See, e.g., *Balasyan v. Nordstrom, Inc.*, 2012 U.S. Dist. LEXIS 181350, *15-16 (S.D. Cal. 2012) (employees must be compensated directly for non-sales work, not by averaging commission wages); *Quezada v. Con-Way Freight, Inc.*, 2012 U.S. Dist. LEXIS 98639, *18-19 (N.D. Cal. 2012) (minimum wage violation where employees paid per mile driven and with hourly rate for work at warehouse, but not for vehicle inspections, paperwork, or the first hour of work); and *Ontiveros v. Zamora*, 2009 U.S. Dist. LEXIS 13073, *13-14, 2009 WL 425962 (E.D. Cal. 2009) (paying mechanics for the number of completed repairs does not compensate for time not performing repairs). At least one district court, however, refused to so hold, indicating that a mileage payment scheme for truck drivers sufficiently compensated for non-driving time under the employer’s control. *Cole v. CRST, Inc.*, 2012 U.S. Dist. LEXIS 144944, *21-22 (C.D. Cal. 2012) (decertifying claims of class where amount paid per mile and time driven averaged above

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minimum wage for non-driving duties too. “Cole fails to demonstrate that non-driving duties are not adequately compensated vis-a-vis CRST’s mileage-based compensation system.” *Id.*).

The conflict between *Gonzalez* and the Central District’s *CRST* decision, as well as the other District Court decisions consistent with *Gonzalez*, makes publication of *Gonzalez* critical. Without guidance from a California Court of Appeal, California employers and employees will be subject to uncertain and changing interpretations of how minimum wage obligations may be satisfied where employees are paid non-hourly methods of compensation.

Gonzalez meets the standard for publication on one or more grounds because it (1) “establishes a new rule of law,” i.e., an employer cannot satisfy its minimum wage obligation by averaging the non-hourly compensation paid to an employee, such as piece-rate compensation; (2) it “applies an existing rule of law to a set of facts significantly different from those stated in published opinions,” i.e., the prohibition against averaging hourly compensation to satisfy minimum wage obligations applies equally to piece-rate compensation; (3) it “modifies ... an existing rule of law,” i.e., the prohibition against averaging hourly compensation to satisfy minimum wage obligations is modified to include non-hourly compensation; and, (4) it “involves a legal issue of continuing public interest,” because it is of continuing interest to employees, employers, and the public, that the method of meeting minimum wage obligations be clear, whether compensation is paid by the hour, the piece, commission, or another method. Rule 8.1105(c)(1)(2)(3)(6).

The publication of *Gonzalez* will help show California employers how to satisfy the obligation to compensate employees for all time worked, will help ensure California employees receive all compensation earned, and will guide trial courts faced with these issues. CELA respectfully urges this Court of Appeal certify its opinion for publication.

Respectfully submitted,
COHELAN KHOURY & SINGER



Michael D. Singer
Wage and Hour Amicus Liaison
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cc: California Employment Lawyers Association
Service List on All Counsel

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On March 13, 2013, I served the foregoing documents described as **REQUEST FOR PUBLICATION** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:


SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

- BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.
- BY FAX:** I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.
- BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed March 13, 2013 at San Diego, California.


Amber Worden

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